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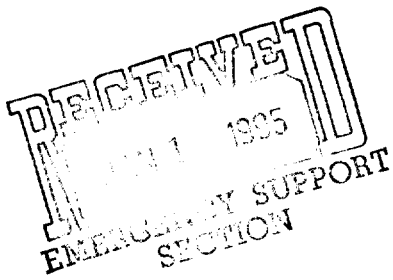
January 12, 1995



Ms. Linda Beasley
Enforcement Specialist
U.S. EPA - Region V
Emergency Support Section HSE-5J
77 West Jackson Boulevard
Chicago, Illinois 60604

RE: Conservation Chemical Company of Illinois, Inc. Site
Gary, Indiana/General Notice of Potential Liability
HSE-5J/EERB

Dear Ms. Beasley:

Enclosed please find a copy of correspondence I sent you on October 19, 1994. Have had a chance for confirm my representations?

Very truly yours,

Timothy J. Rathbun

TJR/ldp

Enclosure

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October 19, 1994

Ms. Linda Beasley
Enforcement Specialist
U.S. EPA - Region V
Emergency Support Section HSE-5J
77 West Jackson Boulevard
Chicago, Illinois 60604

RE: Conservation Chemical Company of Illinois, Inc. Site
Gary, Indiana/General Notice of Potential Liability
HSE-5J/EERB

Dear Ms. Beasley:

Please be advised that this office represents Industrial Color, Inc., regarding correspondence directed to it on September 28, 1994 regarding the Conservation Chemical Company of Illinois CERCLA Cleanup.

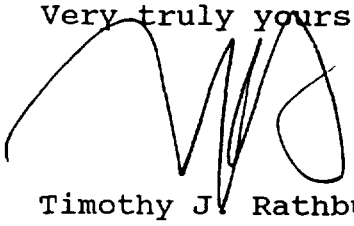
Industrial Color has been notified that it is being considered a responsible party under CERCLA and attached to the correspondence was a generator ranking support summary, demonstrating that Industrial Color is accused of contributing 30,000 gallons under Waste Code 124. The Conservation Chemical Company site was previously the subject of litigation pending in the United States District Court in Northern Indiana. The role of Industrial Color at that site, and its role in that litigation, is clearly set forth in Industrial Color, Inc. v. CP Inorganics, Inc., 613 N.E.2d 302, 184 Ill.Dec. 275 (Ill. App. 3rd Dist. 1993), cert. denied, 190 Ill.Dec 889. In 1971, Industrial Color and CP Inorganics, a company presently known as Phibro-Teck, had an agreement where Industrial Color assisted CP Inorganics in obtaining credit. Industrial Color would be billed for services actually sought and used by CP Inorganics. Industrial Color would pay for the services and later be reimbursed by CP Inorganics.

In 1972, Industrial Color received an invoice from Conservation Chemical Company for the disposal of 30,000 gallons of chromate bearing waste and paid the invoice, later being reimbursed by CP Inorganics, who actually deposited the waste at the Conservation Chemical Company site. In July 1989, the 6500 Highway Group (the appellate decision mislabels the suit as one being brought by the EPA), brought a suit against Industrial Color and others to obtain the cost of cleaning up the site. Industrial Color hired attorneys and negotiated a $3,270 settlement on the $25,000 invoice submitted to it. In Industrial Color vs. CP Inorganics, Industrial Color obtained reimbursement of the $3,270 paid to settle the 6500 Highway Group suit. The appellate decision sets forth Industrial Color's unsuccessful effort to be reimbursed for its attorneys' fees in defending the suit.

After you read the appellate decision, you will include that your appropriate possible responsible party is, in fact, Phibro-Teck, f/k/a CP Inorganics, Inc. By a copy of this correspondence, they are invited to confirm the representations herein and it would be appreciated if you could acknowledge that Phibro-Teck will be substituted for Industrial Color in this matter and that Industrial Color need not be involved further.

Thanking you in advance for your anticipated prompt reply.

Very truly yours,



Timothy J. Rathbun

TJR/ldp

Enclosure

The Court, in a footnote, explained its reasoning as follows:

"Neither [*Tollett*], nor our earlier cases on which it relied [citations], stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations. If they did so hold, the New York Court of Appeals might be correct [in affirming defendant's conviction on the ground that he waived his objection to the double jeopardy violation by pleading guilty]. However, in *Tollett* we emphasized that waiver was not the basic ingredient of this line of cases [citation]. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar that claim.

We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that-judged on its face—the charge is one which the State may not constitutionally prosecute." (Emphasis in original.) *Menna*, 423 U.S. at 62 n. 2, 96 S.Ct. at 242 n. 2, 46 L.Ed.2d 197 n. 2.

Clearly, under *Menna*, defendant in this case could have appealed his felony conviction on the ground that it violated double jeopardy even though that conviction followed a guilty plea. Although defendant admitted factual guilt by pleading guilty, he did not relinquish his objection to being hailed into court in the first place. Nothing in *Menna* indicates, however, that the double jeopardy clause deprives a trial court of jurisdiction to enter a conviction where defendant had been prosecuted previously for the same offense. In fact, the Court stated: "We do not hold that a double jeopardy claim may never be waived." *Menna*, 423 U.S. at 62 n. 2, 96 S.Ct. at 242 n. 2, 46 L.Ed.2d 197 n. 2.

[6] The double jeopardy clause concerns the very authority of the State to require a defendant to answer its charges. (*Blackledge v. Perry* (1974), 417 U.S. 21, 31, 636, 94 S.Ct. 2098, 2104, 40 L.Ed.2d 628.) However, it does not, as defendant argues, concern the authority of a trial court to enter a judgment. This is not a case where there is no statutory authority for defendant's conviction or where there is some defect that goes to the very foundation of the conviction. The case law establishes that the right to be free from double jeopardy is a personal right that can be waived. *People v. Scales* (1960), 18 Ill.2d 283, 285, 164 N.E.2d 76; *People v. Green* (1984), 125 Ill.App.3d 734, 744, 81 Ill.Dec. 44, 466 N.E.2d 630; see also *United States v. Broce* (1989), 488 U.S. 563, 575–76, 109 S.Ct. 757, 765–66, 102 L.Ed.2d 927, 940; *Ricketts v. Adamson* (1987), 483 U.S. 1, 10, 107 S.Ct. 2680, 2686, 97 L.Ed.2d 1, 12; *People v. Camden* (1987), 115 Ill.2d 369, 378–79, 105 Ill.Dec. 227, 504 N.E.2d 96 (defense counsel failed to object to mistrial; therefore, he impliedly acquiesced and second trial was constitutionally permissible).

[7] Defendant argues that we can review the double jeopardy violation as "plain error." A reviewing court could review a double jeopardy claim under the plain error doctrine of Supreme Court Rule 615(a) (134 Ill.2d R. 615(a)) if defendant had failed to raise the claim before the trial court but had timely appealed his conviction. (*People v. Mink* (1990), 141 Ill.2d 163, 172, 152 Ill.Dec. 293, 565 N.E.2d 975.) However, a defendant cannot invoke the plain error doctrine once he has foregone his right to appeal. (See *People v. Owens* (1989), 129 Ill.2d 303, 316–17, 135 Ill.Dec. 780, 544 N.E.2d 276.) At the very least, defendant must file a claim under the Post–Conviction Hearing Act (Ill.Rev.Stat.1991, ch. 38, par. 122–1 *et seq.*) and establish "cause" and "prejudice" for his failure to raise his double jeopardy claim on direct review. *Owens*, 129 Ill.2d at 317, 135 Ill.Dec. 780, 544 N.E.2d 276.

[8] Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to file a motion to withdraw his guilty plea to the felony charge and failed to file a notice of appeal. (*Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2063–64, 80 L.Ed.2d 674, 692.) Because defendant failed to appeal his conviction, however, we have no jurisdiction to review his claim that the ineffective assistance of his trial counsel rendered his conviction unconstitutional. (*People v. Combs* (1990), 197 Ill.App.3d 758, 762, 144 Ill.Dec. 169, 555 N.E.2d 66.) Defendant can only make his ineffective assistance of counsel claim in a petition for post-conviction relief (Ill.Rev.Stat.1991, ch. 38, par. 122–1 *et seq.*). *People v. Wilk* (1988), 124 Ill.2d 93, 107, 124 Ill.Dec. 398, 529 N.E.2d 218.

We are precluded by the doctrine of *res judicata* from considering defendant's double jeopardy claim.

The judgment of the circuit court of Boone County is affirmed.

Affirmed.

McLAREN and BOWMAN, JJ., concur.

244 Ill.App.3d 436
613 N.E.2d 302

INDUSTRIAL COLOR, INC., an Illinois Corporation, Plaintiff–Appellant,

v.

CP INORGANICS, INC., an Illinois Corporation, Defendant–Appellee.

No. 3–92–0605.

Appellate Court of Illinois, Third District.

April 30, 1993.

Rehearing Denied June 7, 1993.

After paint pigment manufacturer's creditor was sued by the Environment Protection Agency (EPA) for cost of cleaning up manufacturer's waste, creditor sought to recover costs of attorney fees on theory of indemnification. The Circuit Court, Will County, Robert C. Lorz, J., entered summary judgment in favor of manufacturer, and creditor appealed. The Appellate Court, Slater, J., held that creditor was not entitled to attorney fees.

Affirmed.

1. Indemnity ⇐13.1(1)

"Implied indemnity" is a contract implied in law arising from legal obligation of indemnitee to satisfy liability caused by actions of his indemnitor.

See publication Words and Phrases for other judicial constructions and definitions.

2. Indemnity ⇐13.1(1)

Fundamental premise underlying action for implied indemnity is recognition that the law may impose liability upon blameless party derivatively through another's conduct.

3. Indemnity ⇐13.3

As indemnitee for a manufacturer of paint pigments, a creditor could not recover attorney fees from the manufacturer, even though the fees were incurred in defending suit by the Environmental Protection Agency (EPA) to recover cost of cleaning up manufacturer's waste, the disposal of which the creditor had originally paid for; generally rule that attorney fees are not allowable to the successful party applied.

Timothy J. Rathbun, McKeown Law Office, Joliet, for Industrial Color, Inc.

Thomas A. Thanas (argued), Mason, Orloff, Reich, Troy & Thanas, Joliet, for CP Inorganics, Inc.

Justice SLATER delivered the opinion of the court:

Plaintiff Industrial Color, Inc., is engaged in the business of manufacturing

and selling pigments used in the production of paint. In 1971, plaintiff and defendant CP Inorganics, Inc., who were adjoining landowners, had an agreement whereby plaintiff would assist the defendant in obtaining credit. Pursuant to the agreement, plaintiff would be billed for services actually sought and arranged for by the defendant. Plaintiff would pay for the services provided to defendant and defendant would thereafter pay the plaintiff.

In July of 1972, plaintiff received an invoice from Conservation Chemical Company for the disposal by defendant of 30,000 gallons of chromate bearing waste at a site in Gary, Indiana. In accordance with the agreement, plaintiff sent a check for $900 as payment and the defendant reimbursed $900 to plaintiff.

In September of 1985, the United States Environmental Protection Agency (EPA) determined that an imminent and substantial endangerment to the public health existed at the Gary waste disposal site. The EPA issued an order under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9606(a) (1988)) directed at plaintiff because its name was included on invoices which indicated that it may have sent or caused to be sent hazardous substances to the Gary site. The EPA billed plaintiff in the amount of $25,000 for its share of the cost of cleaning up the waste disposal site.

In July of 1989, a lawsuit was brought against plaintiff in federal court to obtain the costs of cleaning up the site. Plaintiff hired legal counsel and eventually negotiated a settlement in which it paid $3,270. However, in defending against the suit and negotiating the settlement the plaintiff incurred $10,575.14 in attorney fees. Plaintiff thereafter filed a complaint for indemnification against defendant in the circuit court of Will County. Defendant filed a motion to dismiss the complaint, and the parties agreed to resolve the matter by filing cross-motions for partial summary judgment on the single issue of whether the plaintiff could recover the attorney fees expended in defending the EPA lawsuit. The trial court found that plaintiff was not entitled to recover its attorney fees and granted defendant's motion for partial summary judgment. The court subsequently granted judgment in favor of the plaintiff on its complaint in the amount of $3,270. Plaintiff now appeals from the trial court's determination that it was not entitled to attorney fees.

"The law in Illinois clearly is that absent a statute or a contractual agreement 'attorney fees and the ordinary expenses and burdens of litigation are not allowable to the successful party.' " (*Kerns v. Engelke* (1979), 76 Ill.2d 154, 166, 28 Ill.Dec. 500, 506, 390 N.E.2d 859, 865, quoting *Ritter v. Ritter* (1943), 381 Ill. 549, 553, 46 N.E.2d 41, 43.) Plaintiff does not quarrel with this proposition as a statement of law, but disputes its applicability to this case. Relying on *Sorenson v. Fio Rito* (1980), 90 Ill. App.3d 368, 45 Ill.Dec. 714, 413 N.E.2d 47, and *Nalivaika v. Murphy* (1983), 120 Ill. App.3d 773, 76 Ill.Dec. 341, 458 N.E.2d 995, plaintiff asserts that attorney fees are recoverable here under the general rule that one who commits an illegal or wrongful act is liable for all of the ordinary and natural consequences of that act. As the court explained in *Nalivaika*:

> "Care must be taken to distinguish between the rule prohibiting the recovery of attorney fees from the losing party by the prevailing party in litigation and the rule allowing the recovery of attorney fees incurred in litigation with third parties necessitated by defendants' wrongful act. [Citation.] * * * Where the attorney fees sought by the plaintiff are those incurred in actions with third parties brought about by a defendant's misconduct, the litigation expenses are merely a form of damages and are accordingly recoverable from the defendant." *Nalivaika*, 120 Ill.App.3d at 776, 76 Ill.Dec. at 343, 458 N.E.2d at 997.

Plaintiff contends that the attorney fees it expended in defending the EPA lawsuit were simply an element of damages brought about by the defendant's misconduct and are therefore recoverable under *Sorenson* and *Nalivaika*. We disagree.

Sorenson was a legal malpractice action in which the plaintiff was required to pay tax penalties and interest due to defendant's neglect in settling an estate. The trial court awarded as damages the attorney fees incurred by Sorenson in attempting to obtain a refund of the penalty and interest charges. The appellate court affirmed, finding that the defendant's neglect was the direct cause of the legal expenses.

In *Nalivaika*, the defendants contracted to sell their interest in a land trust to the Ques, but later refused to sell. Plaintiffs, allegedly relying on false and fraudulent statements by the defendants, then contracted to purchase the land from the defendants. The Ques subsequently sued plaintiffs as owners of the property for civil rights violations. After successfully defending against the Ques' lawsuit, the plaintiffs filed a two-count complaint against defendants seeking recovery of attorney fees they had incurred. Count I alleged fraudulent misrepresentation and count II was based on a written indemnity agreement. The trial court dismissed the complaint. The appellate court affirmed the dismissal of count II because the indemnity agreement did not mention attorney fees. The court reversed the dismissal of count I, however, finding that the legal fees were merely a form of damages resulting from defendants' alleged misconduct.

The defendants in both *Sorenson* and *Nalivaika* committed or were alleged to have committed torts against the plaintiffs. The attorney fees allowed as damages were simply an element of damages arising from the tort. In this case the plaintiff has not alleged any tortious conduct by the defendant directed at plaintiff.

[1-3] Plaintiff also contends that it is entitled to attorney fees based upon its cause of action for implied indemnity. Implied indemnity is "a contract implied in law arising from the legal obligation of an indemnitee [here the plaintiff] to satisfy liability caused by actions of his indemnitor." (*Allison v. Shell Oil Co.* (1986), 113 Ill.2d 26, 28, 99 Ill.Dec. 115, 117, 495 N.E.2d 496, 498.) The fundamental premise underlying an action for implied indemnity is the recognition that the law may impose liability upon a blameless party derivatively through another's conduct. (*American National Bank & Trust Co. v. Columbus Cuneo-Cabrini Medical Center* (1992), 154 Ill.2d 347, 181 Ill.Dec. 917, 609 N.E.2d 285. "Thus, * * * reason may exist to continue to recognize the viability of implied indemnity where a principal is vicariously liable for the conduct of an agent or for the nondelegable acts of an independent contractor." *American National*, 154 Ill.2d at 351, 181 Ill.Dec. at 920, 609 N.E.2d at 288.

The issue of attorney fees in the context of an indemnity action was addressed in *Kerns v. Engelke* (1979), 76 Ill.2d 154, 28 Ill.Dec. 500, 390 N.E.2d 859. In *Kerns*, the plaintiff was injured by a forage blower, and he brought suit against his employers (the Engelkes), the manufacturer of the blower (Fox River) and the retailer (Timmerman). A jury found that the Engelkes were liable for negligence and that Fox River and Timmerman were liable on the basis of strict liability. Timmerman received a judgment on his counterclaim for indemnity against Fox River, including an award for attorney fees expended in defending the suit. The appellate court affirmed and remanded for a determination of the amount of the attorney fees. In reversing the judgment for attorney fees, the supreme court cited *Ritter v. Ritter* (1943), 381 Ill. 549, 46 N.E.2d 41, for the proposition that attorney fees and the ordinary expenses of litigation are not recoverable. The court then stated:

> "The appellate court distinguished the instant case from *Ritter* and the general proposition above in that the attorney's fees here were the result of defending a prior action which gave rise to the indemnity claim. * * * We are not persuaded we should create an indemnity exception to the *Ritter* holding even under the circumstances of this case in which Timmerman gave Fox River sufficient notice, and was ostensibly entitled to indemnification. Timmerman was properly sued as a defendant strictly liable; and that

Timmerman was successful in the indemnity action is not a distinction sufficient to remove him from the ruling in *Ritter*." *Kerns*, 76 Ill.2d at 166–67, 28 Ill.Dec. at 507, 390 N.E.2d at 865.

Plaintiff argues that *Kerns* is not applicable to this case, however, because unlike the indemnity plaintiff in *Kerns*, plaintiff here was not "properly sued as a defendant." In effect, plaintiff contends that it was improperly sued by the EPA and only settled the case to avoid additional litigation expenses. If we were to accept this argument, however, plaintiff would not have a cause of action for implied indemnity.

As stated earlier, implied indemnity is based upon the premise that the plaintiff-indemnitee has been held liable for the acts of the defendant-indemnitor. If the plaintiff in this case was not liable for the cost of cleaning up the waste disposal site, and thus was not "properly sued as a defendant", there would be no basis for indemnity. In such a situation, plaintiff would not be seeking restitution for payments it was legally required to make due to defendant's conduct. Instead, plaintiff would be attempting to make defendant responsible for the consequences of the EPA's mistake in suing the wrong party. We do not believe that the concept of implied indemnity would support such a notion.

We find that the plaintiff's request for attorney fees was properly denied under *Kerns*, and we affirm the trial court's order granting defendant's motion for summary judgment on that issue. We note that the judgment for plaintiff for $3,270 on its complaint for indemnification has not been appealed and is not at issue here.

For the reasons stated above, the judgment of circuit court is affirmed.

Affirmed.

BRESLIN and LYTTON, JJ., concur.

244 Ill.App.3d 424

613 N.E.2d 305

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Stanley PARROTT, Defendant-Appellant.

No. 3–92–0178.

Appellate Court of Illinois, Third District.

April 30, 1993.

Sexually dangerous defendant's conditional release was revoked by the Circuit Court, La Salle County, George Hupp, J., after he violated condition of release by failing to avoid unsupervised contact with children, and he appealed. The Appellate Court, Slater, J., held that: (1) defendant's continuing status as sexually dangerous person obviated any need for finding of current dangerousness, and (2) recommitment did not violate equal protection or due process.

Affirmed.

1. Constitutional Law ⇐255(5)
Mental Health ⇐448

Conditional release of defendant who earlier had been found to be sexually dangerous person did not constitute a finding that defendant was no longer sexually dangerous; thus, the revocation and recommitment of defendant without finding that he was currently sexually dangerous did not violate due process. Ill.Rev.Stat.1991, ch. 38, ¶ 105–9; U.S.C.A. Const.Amend. 5.

2. Constitutional Law ⇐255(5)
Mental Health ⇐448

Defendant who previously had been found to be sexually dangerous beyond a reasonable doubt was not treated more harshly than other groups of mentally ill persons in violation of his equal protection rights merely because his conditional release had been revoked without a showing of present dangerousness by clear and convincing evidence; the recommitment was based on earlier finding of sexual dangerousness beyond reasonable doubt which had not been changed by the conditional release. Ill.Rev.Stat.1991, ch. 38, ¶ 105–9; U.S.C.A. Const.Amend. 14.

3. Mental Health ⇐448

Purpose of conditional release of defendants who have been found to be sexually dangerous is to determine whether person who no longer appears to be sexually dangerous is able to function in noninstitutional setting; if defendant's acts demonstrate that he has not recovered, recommitment is mandated. Ill.Rev.Stat.1991, ch. 38, ¶ 105–9.

4. Constitutional Law ⇐242.1(5)

No equal protection violation arises from fact that recommitment of sexually dangerous person who has been conditionally released is mandatory if defendant has violated condition of release while other criminal defendants who have violated condition of probation may be continued on existing sentence with or without modifying probation conditions; probation is sentence imposed for criminal conviction while conditional release is one aspect of treatment of sexually dangerous persons. U.S.C.A. Const.Amend. 14; Ill.Rev.Stat. 1991, ch. 38, ¶ 105–9.

5. Evidence ⇐99

Evidence is relevant if it tends to make proposition at issue either more or less probable.

6. Mental Health ⇐448

Evidence of pornographic magazines and pictures depicting women apparently intended to resemble prepubescent girls were relevant to defendant's state of mind for purposes of proceeding in which defendant who was sexually dangerous person was recommitted for violation of condition of release involving defendant's contact with children.

7. Appeal and Error ⇐970(2)

Trial court's decision to admit evidence based on the balancing of probative value and prejudicial effect of the evidence will not be disturbed absent abuse of discretion.

Robert Agostinelli, Deputy Defender (argued), Office of the State Appellate Defender, James Brusatte, Ottawa, for Stanley Parrott.

John X. Breslin, Deputy Director, State's Attys. Appellate Prosecutor, Joseph Navarro, State's Atty., Judith Z. Kelly (argued), States' Attys. Appellate Prosecutor, Ottawa, for People.

Justice SLATER delivered the opinion of the court:

Defendant Stanley Parrott was committed to the Department of Corrections in 1975 under the provisions of the Sexually Dangerous Persons Act (the Act) (Ill.Rev. Stat.1975, ch. 38, par. 105–1.01 *et seq.*). In 1977, after the Illinois Supreme Court held that the standard of proof necessary for commitment under the Act was proof beyond a reasonable doubt (see *People v. Pembrock* (1976), 62 Ill.2d 317, 342 N.E.2d 28), the State filed a second petition to commit the defendant. At the hearing on this petition, the parties stipulated to admission of the evidence presented at the 1975 hearing, and the court found the defendant to be sexually dangerous beyond a reasonable doubt. This finding was affirmed on appeal to this court. *People v. Parrott* (1982), 108 Ill.App.3d 222, 63 Ill. Dec. 950, 438 N.E.2d 1313.

On April 26, 1991, the trial court granted the defendant's petition for conditional release pursuant to section 9 of the Act (Ill. Rev.Stat.1991, ch. 38, par. 105–9). Section 9 provides that where a patient no longer appears to be dangerous but it cannot be determined with certainty that he has fully recovered, the court shall release him subject to such conditions and supervision as are necessary to protect the public.

On October 18, 1991, the State filed a petition to revoke defendant's conditional release. The State alleged that defendant had violated a condition of his release by failing to avoid unsupervised contact with children or adolescents. After a hearing on February 14, 1991, the trial court revoked the defendant's conditional release and remanded him to the custody of the

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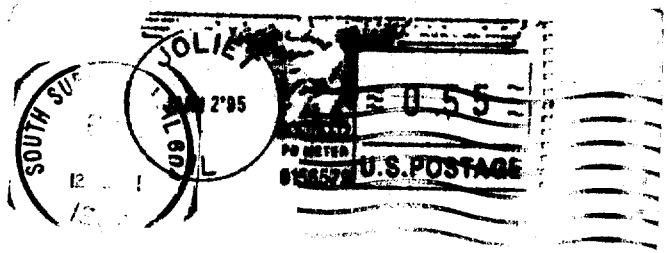

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